No. 85-1974

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD A. WHITTINGTON AND
W. LEWIS DEMOSS, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court should have granted immunity to two prospective defense witnesses.

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OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. la-42a) is reported at 783 F.2d 1210. The opinion of the court of appeals on rehearing (Pet. App. 43a-55a) is reported at 786 F.2d 644.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1986. A petition for rehearing was denied on April 2, 1986. The petition for a writ of certiorari was filed on May 30, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Western District of Louisiana, petitioners were convicted on two counts of making material false

statements to the United States Department of Agriculture ("USDA") for the purpose of receiving milk subsidies, in violation of 18 U.S.C. 1001; on one count of submitting a false claim for milk subsidies, in violation of 18 U.S.C. 287; and on one count of conspiring to commit those offenses, in violation of 18 U.S.C. 371. Petitioner Whittington was sentenced to a five-year term of probation, fined $10,000, and ordered to pay restitution of $69,830.85. Petitioner DeMoss was sentenced to a five-year term of probation and fined $10,000. The court of appeals affirmed (Pet. App. la-42a).

1. The evidence at trial, the sufficiency of which is not now challenged, is detailed in the opinion of the court of appeals (Pet. App. 2a-27a). Briefly, it showed that petitioners and co-defendant Richard Wolfe[1] conspired to obtain USDA milk subsidies to which they were not entitled under the Dairy Production Stabilization Act of 1983, Pub. L. No. 98-180, 97 Stat. 1128 *et seq.*

In June 1983, petitioners were officers and members of the board of directors of Louisiana Pacific Resources, Inc. (Louisiana Pacific), which operated a dairy farm known as the Riverland Dairy (Pet. App. 3a). By the summer of 1983, Louisiana Pacific's dairy operations had become unprofitable; petitioner Whittington accordingly began negotiations looking toward the sale of the dairy's property to Wolfe (*id.* at 4a-7a). Petitioners and Wolfe, however, wished to keep the dairy in business during the negotiations so that it might qualify for milk subsidy payments under the Dairy Production Stablization Act, which was then pending in Congress. Accordingly, they arranged for Louisana Pacific to lease the dairy to another company, Triple Crown Farms. A written lease was executed in September 1983 (*id.* at 7a; GX G-1).

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[1]Wolfe was convicted of conspiracy and making a false statement (Pet. App. 12a).

The milk subsidy statute was enacted later that year. To petitioners' surprise, however, it provided that a dairy operator could qualify for a subsidy only if it had been producing milk in 1982 *and* still was engaged in milk production as of November 29, 1983. Because petitioners had leased their dairy to Triple Crown in September 1983, and thus were not operating it on November 29, 1983, they did not qualify for a subsidy.[2] Petitioners nevertheless applied for a subsidy, falsely representing to USDA that Triple Crown was managing the dairy for them. A few months later, in April 1984, petitioners received a $139,741.40 subsidy payment based on their false claims. Pet. App. 3a, 9a, 20a-22a, 24a-25a.

2. At trial, Murray Lynn, a vice-president of Lousiana Pacific's bank, and Johnny Terrell, Triple Crown's bookkeeper, were subpoenaed as prospective defense witnesses. Both Lynn and Terrell had earlier told government investigators that the dairy had not been leased to Triple Crown, asserting instead that Triple Crown had acted as a managing agent for Louisiana Pacific (Pet. App. 30a, 45a). Terrell also had testified before a grand jury that the arrangement between Triple Crown and Louisiana Pacific was a management agreement rather than a lease (*ibid.*). Prior to petitioner's trial, Terrell had been indicted for perjury based upon that testimony, and Lynn had been advised that he was under investigation for obstruction of justice for giving false information about the case to the government agents (*ibid.*).

When Lynn and Terrell appeared at trial in response to the defense subpoenas, they refused to testify, asserting their Fifth Amendment privilege against compelled self-incrimination. The district court upheld Terrell's assertion of the privilege because he had been indicted for perjury

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[2]Triple Crown also was ineligible for the subsidies because it had not been operating the dairy in 1982 (Pet. App. 9a).

based on his grand jury testimony about the matters at issue at trial (Pet. App. 45a). The district court also upheld Lynn's invocation of the privilege (*ibid.*). Petitioners then requested the district court to grant immunity to Lynn and Terrell so that they would be available to testify for the defense, although petitioners made no showing that either Lynn or Terrell actually would testify favorably to the defense if they were granted immunity (see II-B Tr. 293-276, 293-279). The court denied that request, observing that the "[g]ranting of immunity is an executive act" (*id.* at 293-276).

The court of appeals (Pet. App. 29a-42a) upheld the district court's refusal to immunize Lynn and Terrell. The court of appeals rejected petitioners' claim that the government had attempted to intimidate Lynn and Terrell, finding that prosecutorial action directed against those individuals had been prompted by legitimate law enforcement objectives (*id.* at 34a-39a).[3] And the court of appeals affirmed the district court's conclusion that it lacked the authority to immunize defense witnesses, holding that "in the absence of governmental abuse the [district] court may not direct the government to grant use immunity to a defense witness who invokes the fifth amendment" (*id.* at 40a-41a).[4]

ARGUMENT

Petitioners contend (Pet. 22-31) that the refusal of the courts below to immunize prospective defense witnesses Lynn and Terrell conflicts with decisions of this Court and of the Second and Third Circuits.

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[3]Petitioners also complained that Lynn was served another subpoena in court just prior to his testimony. The court concluded (Pet. App. 39a) that, although that government action was "unseemly," it did not compromise the fairness of the trial.

[4]The court of appeals also rejected petitioners' contention, which they do not raise here, that the prospective witnesses' assertion of their privilege should not have been sustained (Pet. App. 31a-34a, 46a-54a).

1. Contrary to petitioners' claim (Pet. 28-30), this Court never has recognized the existence of judicial authority to immunize defense witnesses. The federal immunity statute (18 U.S.C. 6003(b)) vests the power to grant immunity in the Executive Branch rather than the Judiciary. The Court accordingly has explained that the authority to immunize witnesses "is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983). See *id.* at 253-254. The corollary of this principle, of course, is that "[n]o court has authority to immunize a witness" (*id.* at 261; see *id.* at 262). Not surprisingly, then, the courts of appeals have held overwhelmingly that judges may not immunize defense witnesses without a request from the prosecution.[5]

2. Despite this authority, the Third Circuit has held that a district court may immunize a defense witness when that witness has essential exculpatory information that is unavailable from other sources. See *Government of Virgin Islands*

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[5]See, *e.g.*, *Autry* v. *Estelle*, 706 F.2d 1394, 1401-1402 (5th Cir. 1983), cert. denied, 465 U.S. 1085 (1984); *United States* v. *Heffington*, 682 F.2d 1075, 1080-1081 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Herbst*, 641 F.2d 1161, 1168 (5th Cir.), cert. denied, 454 U.S. 851 (1981); *United States* v. *Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Lenz*, 616 F.2d 960, 962 (6th Cir.), cert. denied, 447 U.S. 929 (1980); *In re Daley*, 549 F.2d 469, 479-480 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1356 n. 115 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Alessio*, 528 F.2d 1079, 1081-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); *Thompson* v. *Garrison*, 516 F.2d 986, 988 (4th Cir.), cert. denied, 423 U.S. 933 (1975); *United States* v. *Allstate Mortgage Corp.*, 507 F.2d 492, 494-495 (7th Cir.), cert. denied, 421 U.S. 999 (1974). See also Note, *The Case Against a Right to Defense Witness Immunity*, 83 Colum. L. Rev. 139 (1983).

v. *Smith*, 615 F.2d 964 (3d Cir. 1980). Whatever the validity of the Third Circuit's rule, it is applicable by its terms only when the defendant makes "a convincing showing" that the proffered testimony is "clearly exculpatory" and "essential to the defendant's case." In addition, "[i]mmunity will be denied if the proffered testimony is found to be * * * cumulative." *Id.* at 972. The Third Circuit thus has found a judicial grant of immunity appropriate only when there is "a probable certainty that * * * [the] expected testimony * * * would * * * *in itself* exonerate [the defendant]." *United States* v. *Lowell*, 649 F.2d 950, 965 (3d Cir. 1981) (emphasis in original).

There is no need for the Court to reconcile the conflicting rules stated by the Third Circuit and the court below, because petitioners have failed to satisfy even the Third Circuit's requirements for a judicial grant of immunity.[6] Petitioners made no proffer concerning the testimony of Lynn and Terrell, and thus failed to show that the prospective witnesses would have testified favorably to the defense—let alone that their evidence "in itself" would have exonerated petitioners.[7] Nor was there any showing that

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[6]Even apart from the inapplicability of the Third Circuit standard on the record here, that court has not addressed the propriety of it in any case since this Court's decision in *Pillsbury Co.* v. *Conboy, supra.* The Third Circuit thus has not yet had an opportunity to consider the implications of the *Conboy* analysis for its immunity approach. Until it does so, there will be no need for this Court to address the validity of the Third Circuit's pre-*Conboy* standard.

[7]We note that both Lynn and Terrell offered their exculpatory versions of the arrangement between petitioners and Triple Crown prior to the return of any indictment and prior to the government's accumulation of substantial evidence showing that Triple Crown had in fact leased the dairy from petitioners. On the other hand, the witnesses' refusal to testify at trial came after those developments and after the alleged falsity of their prior statements led to their own legal difficulties. These circumstances suggest that, if the witnesses were immunized, they very well might have contradicted their prior statements and further undermined the defense.

Lynn and Terrell were essential defense witnesses. To the contrary, all three defendants (including the signatories of the Triple Crown lease, Whittington and Wolfe), as well as the attorneys for Whittington and Triple Crown, testified for the defense concerning the nature of the agreement between Louisiana Pacific and Triple Crown. See, *e.g.*, II-B Tr. 293-249 to 293-260; III Tr. 356; V Tr. 604-606, 617, 646-648, 727-745. The testimony of Lynn and Terrell, even if favorable to the defense, would thus have been entirely cumulative.

3. Petitioners also note (Pet. 30-31) that the Second Circuit has articulated a standard permitting district courts to direct the government to request immunity for a defense witness when "(1) the government has engaged in a discriminatory use of immunity to gain a tactical advantage or, through its own overreaching, has forced the witness to invoke the Fifth Amendment; and (2) the witness' testimony will be material, exculpatory and not cumulative." *United States* v. *Burns*, 684 F.2d 1066, 1077 (2d Cir. 1982), cert. denied, 459 U.S. 1174 (1983). Petitioners assert that the application of this standard to their case would require a grant of immunity to Lynn and Terrell. In fact, however, the court below appears to have applied a standard quite similar to the one urged by petitioners (see Pet. App. 36a-37a, 41a). In doing so, the court of appeals, like the district court, rejected petitioners' claims of government overreaching or misconduct (*id.* at 32a-40a; III Tr. 311-316). This factual finding, which is fatal to petitioners' position, does not warrant review by the Court.[8]

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[8]Petitioners' claim would fail in the Second Circuit for a wholly independent reason as well: as noted above, they failed to make a showing that the testimony at issue would be either exculpatory or noncumulative.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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